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374-310

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 973

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15–32) is reported at 415 F. 2d 440. The Board's decision and order (Pet. App. 44–111) and supplemental decision and order (Pet. App. 34–43) are reported at 148 NLRB 1080 and 167 NLRB No. 8, respectively.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1969. The petition for a writ of certiorari was filed on December 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the finding of the National Labor Relations Board that the employer locked out its employees for the sole purpose of forcing their bargaining representative to accept its legitimate bargaining proposals—thus making the lockout a lawful one—is supported by substantial evidence.

STATUTES INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at pp. 2–3 of the petition.

STATEMENT

On January 22, 1963, Hess Oil and Chemical Corporation (the "Company") purchased the Corpus Christi, Texas, oil refinery involved in this case from the Delhi-Taylor Oil Refining Company (Pet. App. 36, 54; R. 98–99, 127).[1] Petitioner (the "Union") had represented a bargaining unit of production and maintenance employees at the refinery for over 21 years (Pet. App. 36–37, 55–57; R. 98, 100, 102, 137, 221, 247). The Board found, and the Company stipulated, that the unit, which had always included both laboratory and warehouse employees, was an appropriate one for collective bargaining purposes, and that the Union has at all material times represented a majority of the unit employees (Pet. App. 36–37, 56; R. 221–222, 234–235).[2]

[1] "R." refers to the joint appendix in the court below, a copy of which has been filed with the Clerk of this Court.

[2] The Union had been recognized by Delhi-Taylor without Board certification (Pet. App. 55, n. 13; R. 224).

Between March 8 and April 1, 1963, representatives of the Company and the Union met eight times in an effort to negotiate a collective bargaining agreement. Early in the course of these negotiations the Company's Senior Vice-President, H. W. McCollum, notified Union representatives W. J. Forrester and J. Elro Brown that the Company would assume operative control of the refinery on April 1, 1963 (Pet. App. 36, 57, 58; R. 102, 248); that it would not assume the existing collective bargaining agreement between the Union and Delhi-Taylor, which then had a year to run, but did want to negotiate a new agreement (Pet. App. 36, 58–59; R. 138, 248); and that any new agreement would have to contain certain changed provisions, which he then set forth (Pet. App. 36, 57–58; R. 102–104, 138–139, 259). Among these provisions was one which excluded laboratory and warehouse employees from the bargaining unit (Pet. App. 36, 58; 138, 185–186). McCollum explained that the Company wanted to exclude laboratory employees because they were not covered by collective bargaining agreements at any of the Company's other locations, to which they would probably be transferred from time to time, rather than remaining exclusively at Corpus Christi (Pet. App. 90, n. 58; R. 112–113, 287–291). As to the warehouse employees, McCollum stated that the Company planned to retain only one, who would be given substantially more responsibility for record-keeping (Pet. App. 90, n. 58; R. 113–114, 291–294).[3] The Union advised McCollum that it

[3] There were 26 laboratory and six warehouse employees in the unit of approximately 200 (Pet. App. 56–57; R. 191–192, 220, 237).

"would have to represent laboratory and warehouse employees because [it] felt that [it] had an obligation to them" (Pet. App. 37; R. 158).

In the course of the ensuing negotiations the Company and the Union reiterated their respective positions with regard to the exclusion of these employees from the unit. However, as more fully set forth in the trial examiner's decision (Pet. App. 57–74), the negotiations were devoted almost wholly to economic and other major matters at issue between the parties. The Union took the position that the Company should adopt the existing contract with Delhi-Taylor in its entirety for a period of one year (Pet. App. 64; R. 158–161, 261). The Company insisted however, that in order to turn the refinery, which had been losing money, into a profitable operation the Union would have to agree to: (1) a two-year contract, not to become effective until June 1, 1963, so as to provide the Company with a probationary period of two months within which it could terminate employees without any right on the part of the Union to file grievances; (2) a seniority provision under which employees retained after this period would be given numerical placement in accordance with their standing on the existing list; (3) a reduction in the number of existing employee job classifications and lines of promotion; and (4) elimination of the present provision restricting the subcontracting of work (Pet. App. 57–58; R. 102–105, 137–139, 248–251, 253–256, 267–268, 269–271). McCollum indicated that if the Union did not communicate its acceptance of these terms to him

by March 25, the Company would not continue operation of the refinery after April 1, 1963 (Pet. App. 58, n. 20, 60–61, 66; R. 105–106, 138, 139, 143–144, 169, 171).

On the evening of March 25, 1963, the Union voted on the Company's written proposal of that date, which incorporated all of McCollum's earlier demands, including clauses excluding the laboratory and warehouse employees from the bargaining unit. After the voting, McCollum was notified by telegram that "the employees * * * [had] voted overwhelmingly not to accept the proposal" (Pet. App. 67–68; R. 169–172, 261, 279, 331). Shortly thereafter, McCollum telephoned Brown, who informed him that one of the problems standing in the way of agreement was Delhi-Taylor's failure to come to terms with the Union over certain termination and accrued vacation pay to which the Union felt the employees were entitled. Brown stated that, if McCollum could persuade Delhi-Taylor to pay the employees what they thought they deserved, he felt there would be no problem in reaching agreement on a contract, but that these matters had to be straightened out first (Pet. App. 68–69 and n. 29; R. 172–173, 279–280). McCollum stated that he was "anxious not to shut the refinery down" and would speak to Delhi-Taylor President Sewell (Pet. App. 69; R. 280).

By March 28, McCollum had succeeded in settling the dispute between Delhi-Taylor and the Union (Pet. App. 69–71; R. 173–175, 281–282). Nevertheless, the Union again rejected the Company's proposed con-

tract, and on April 1 the Company shut down the refinery (Pet. App. 38–39, 72–73; R. 199, 215, 306). It remained closed until May 7, 1963, at which time the Company recalled all but nine of the employees (Pet. App. 78–79; R. 215–217, 224, 244–245).[4] An unfair labor practice proceeding against the Company ensued.

On the facts presented to it, the Board concluded in its original decision and order of September 16, 1964 (Pet. App. 44–111), that the respondent Company had violated Sections 8(a)(5) and (1) of the Act by unlawfully insisting that the laboratory and warehouse employees be excluded from the existing bargaining unit, and Sections 8(a)(1), (3) and (5) of the Act by locking out its employees as a means of compelling Union acceptance of its contract proposals (Pet. App. 44–45, 90, 98–99). On September 23, 1964, the Company filed a petition for review of the Board's order in the court of appeals below. On June 2, 1965, however, the court of appeals granted the Board's motion for a stay of further proceedings pending its reconsideration of the case in light of this Court's decision in *American Ship Building Co.* v. *National Labor Relations Board,* 380 U.S. 300. (Pet. App. 17, 35).

[4] Although the parties met on five or six occasions after the refinery closed, there was little change of position, and at the final meeting on May 22, after the employees had already been recalled to work, there was still fundamental disagreement on the Company's proposals (Pet. App. 73–82; R. 201–202, 205–215, 231–232, 294–304).

On August 17, 1967, the Board issued a supplemental decision and order (Pet. App. 34–43). It reaffirmed its initial finding and order based thereon, that the Company's insistence upon the exclusion of the laboratory and warehouse employees from the unit was unlawful;[5] it set aside, however, its previous finding that the Company had engaged in an unlawful lockout. More specifically, the Board found (Pet. App. 38, 40–41) that, although the Company's insistence upon the exclusion of the two classes of employees from the unit was violative of the Act, both the Company and the Union had been content to defer resolution of this issue until settlement of the substantive terms of the contract; that the Company had not conditioned execution of such a contract upon the Union's agreement to exclude the laboratory and warehouse employees; and that the Company's position with respect to such exclusion had not materially motivated its decision to lock out its employees. In the light of these subsidiary findings, the Board further concluded that the lockout was not in furtherance of the Company's unlawful insistence upon the exclusion of the two classes of employees from the unit, but rather in support of its legitimate bargaining proposals on which the parties had reached an impasse, and that therefore, under *American Ship Building Co.*, it had not violated the Act. Accordingly, the Board dismissed the

[5] The Board found that, although it was not unlawful for the Company to propose alteration of the unit, it could not lawfully insist upon this over the Union's objection since such a change is not a mandatory subject of collective bargaining (Pet. App. 37, n. 4). The validity of this finding is not in issue here.

allegations of the complaint pertaining to the lockout (Pet. App. 41).

The court of appeals sustained the Board's findings, enforced its order, and dismissed both the Company's petition to review the Board's 8(a)(5) findings and the Union's petition to review that portion of the Board's supplemental decision and order relative to the validity of the lockout (Pet. App. 15–32).

ARGUMENT

The question which petitioner seeks to raise—whether an employer violates the Act by locking out his employees in order to force their bargaining representative to accept a non-mandatory bargaining proposal—is not presented on the record in this case. On the basis of the facts summarized in the Statement (*supra*, pp. 3–6), and more fully set forth in the trial examiner's decision (Pet. App. 57–74), the Board found, and the court of appeals agreed (Pet. App. 40–41, 31–32), that the Company's insistence on the exclusion of the two classes of employees from the unit did not contribute to the impasse between the parties, or to their failure to reach agreement, and thus did not prompt the lockout. Accordingly, both the Board and the court of appeals concluded that the lockout was in support of the Company's legitimate bargaining proposals, and therefore lawful under this Court's decision in *American Ship Building*

Co., supra, 380 U.S. at 306, 318. Petitioner's contention that the lockout was in support of both the mandatory and non-mandatory bargaining proposals and therefore illegal rests upon its differing reading of the record and simply raises an evidentiary issue which is not appropriate for further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491.

Moreover, the record, as the court of appeals concluded, adequately supports the Board's finding that the Company's insistence upon the inclusion of the two classes of employees from the unit was not a significant factor in the Company's decision to lock out the employees. It is clear from the record as a whole that, although the parties disagreed over the Company's proposal to exclude these employees from the coverage of any collective bargaining agreement, this problem receded into the background as the negotiations focused upon the major matters at issue between the parties. In the circumstances, the Board could reasonably find, as it did, that the lockout was in support of the Company's legitimate mandatory bargaining proposals and therefore lawful. Thus, the decision below is in accord with *American Ship Building Co.* and not in conflict with the decisions of other courts of appeals cited by petitioner (Pet. 10–13).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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